No. 141, Original

Supreme Court, U.S.
FILED
JAN 2 9 2015
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF ELEPHANT BUTTE IRRIGATION DISTRICT FOR LEAVE TO INTERVENE

HECTOR H. BALDERAS
Attorney General
STEPHEN R. FARRIS
SARAH A. BOND*
Assistant Attorneys General
AMY I. HAAS
Special Assistant Attorney General
General Counsel,
New Mexico Interstate Stream Commission
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-827-6010
sbond@nmag.gov
**Counsel of Record*

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

JOHN B. DRAPER
Special Assistant Attorney General
DRAPER & DRAPER LLC
505-570-4590

JEFFREY J. WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
505-982-3873

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. EBID DOES NOT MEET THE HIGH STANDARD REQUIRED TO INTERVENE IN THIS INTERSTATE COMPACT DISPUTE	3
II. EBID'S INTEREST IS NEITHER COMPELLING NOR UNIQUE	5
A. EBID Is a Creature of the State of New Mexico	6
B. EBID Is Not a Bistate Entity or an Entity Whose Participation Is Necessary to Resolve This Action	9
C. The Compact Assigns No Rights or Obligations to EBID	15
III. EBID'S INTEREST IS REPRESENTED BY NEW MEXICO, ITS STATE OF INCORPORATION AND SOLE STATE OF OPERATION	19
CONCLUSION	24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) 20, 21

Colorado v. New Mexico, 459 U.S. 176 (1982) 12

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).....17, 21

Ickes v. Fox, 300 U.S. 82 (1937).....17

Kansas v. Colorado, 206 U.S. 46 (1907).....4

Kansas v. Colorado, 533 U.S. 1 (2001).....12, 21

Maryland v. Louisiana, 451 U.S. 725 (1981).....21

Nebraska v. Wyoming, 515 U.S. 1 (1995).....3, 4, 19

New Jersey v. New York, 345 U.S. 369 (1953)....*passim*

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).....12

Poole v. Fleeger, 36 U.S. (11 Pet.) 185 (1837) 21

South Carolina v. North Carolina, 558 U.S. 256 (2010).....*passim*

Tarrant Regional Water District v. Herrmann, 133 S. Ct. 2120 (2013).....4

Texas v. New Mexico, 482 U.S. 124 (1987).....12, 21

TABLE OF AUTHORITIES – Continued

Page

U.S. Telecom Ass'n v. F.C.C., 359 F.3d 554 (D.C. Cir. 2004) 18

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 17

STATE CASES

New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., No. 96-CV-888, Order (Aug. 16, 2012) 15

New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., No. 96-CV-888, Order (Feb. 17, 2014) 15

Tompkins v. Carlsbad Irr. Dist., 630 P.2d 767 (N.M. Ct. App. 1981) 18

U.S. CONSTITUTION

U.S. Const. art. I, § 10, cl. 3 9

U.S. Const. art. III, § 2, cl. 2 ..... 1, 16

FEDERAL STATUTES

28 U.S.C. § 1251(a) 1

43 U.S.C. § 372 17

43 U.S.C. § 383 17

43 U.S.C. § 498 18

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATE STATUES

N.M. Laws 1915, Chap. 100, as amended by N.M. Laws 1917, Chap. 21.....8

SUMMARY OF ARGUMENT

Elephant Butte Irrigation District (EBID) does not meet this Court's high standard for intervention. This original action presents a dispute between States involving core sovereign interests, that, but for the Court's original exclusive jurisdiction under United States Constitution Article III, Section 2, clause 2 and 28 U.S.C. § 1251(a), would be a *casus belli*. The State represents all its citizens *parens patriae*, and therefore nonstate entities are not generally allowed to intervene. Interstate water compact cases concern the compact apportionment agreed to *by the States* under the Constitution, not state-law questions of how water is allocated among competing interests *within* the State. Contrary to EBID's claims, it has no special role in New Mexico's compliance with the Rio Grande Compact (Compact). It is an irrigation district that distributes water pro rata to its users in accordance with Reclamation Act contracts and state law.

The Court requires a potential nonstate intervenor to an original exclusive action to demonstrate (1) a "compelling interest in its own right, apart from [its] interest in a class with all other citizens and creatures of the state," and (2) "which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). Applying this high standard for intervention

here reveals that EBID does not have a sufficiently distinct interest to be allowed to intervene as a party alongside the States. In this case, the State of Texas seeks enforcement of the Compact and an injunction against the State of New Mexico enjoining New Mexico from actions Texas alleges are inconsistent with the Compact. The States of Colorado, New Mexico and Texas are the signatories to the Compact, and fully represent their water users with respect to the Compact. Like all other citizens in New Mexico, including municipalities supplying water for their citizens, EBID could be affected by the outcome of this case because all New Mexico water users and distributors must divide New Mexico's share of water. In this respect EBID is not unique; it is simply one among many that share a common interest with the State in ensuring that New Mexico receives its full share of Compact water. Nor does EBID play an independent role in New Mexico's Compact compliance. EBID is an irrigation district that distributes Rio Grande Project (Project) water from the river to its constituent farmers in New Mexico. The Court should deny EBID's Motion for Leave to Intervene (Motion) because EBID's interest is neither compelling nor unique, and New Mexico fully represents all of its water users and distributors, including EBID.

ARGUMENT

I. EBID DOES NOT MEET THE HIGH STANDARD REQUIRED TO INTERVENE IN THIS INTERSTATE COMPACT DISPUTE

"[T]he standard for intervention in original actions by nonstate entities is high – and appropriately so." *South Carolina v. North Carolina*, 558 U.S. at 267. Contrary to EBID's implication, *see* Memorandum of Points and Authorities (Mem.) at 19, there is no "general rule" favoring intervention by nonstate entities. Quite the opposite is true: the "general rule" is that a nonstate entity's motion to intervene "will be denied" unless it can meet the high standard that the Court has established. *Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *see South Carolina v. North Carolina*, 558 U.S. at 266. That standard, which serves the "twin purposes" of respect for "sovereign dignity" and "good judicial administration," is as follows:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

South Carolina v. North Carolina, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373).

"Respect for state sovereignty . . . calls for a high threshold to intervention" by purely intrastate political subdivisions like EBID to guard against the use of

the Court's original jurisdiction "as a forum in which 'a state might be judicially impeached on matters of policy by its own subjects.'" *Id.* at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). A State in its sovereign capacity "represents the interests of its citizens in an original action, the disposition of which binds the citizens." *Id.*; *see Nebraska v. Wyoming*, 515 U.S. at 21 ("Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all its citizens. A State is presumed to speak in the best interests of those citizens." (Internal quotation omitted)). In an interstate compact case, States alone possess the "core state prerogative to control water within their own boundaries." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132-33 (2013). In defending against another State's Compact claim, a state should not be required simultaneously to defend against any of its own citizens' particular views of the matter. Resolution of rights in a dispute between States invokes matters rooted in state sovereignty that rise "above a mere question of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). The Court's work here is to ascertain the States' intent from the plain language of the Rio Grande Compact Act of May 31, 1939, ch. 155, 53 Stat. 785, applying presumptions rooted in notions of state sovereignty. *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2132, 2133. For that reason, this Court has never allowed a political subdivision of a state to intervene over the objection of that state.

Moreover, a high standard for intervention is necessary to ensure that original actions, which already "tax the limited resources" of the Court, "do not assume the 'dimensions of ordinary class actions.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). If a nonstate entity could intervene merely on the basis of a difference of opinion with its sovereign, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

In this case, EBID cannot meet any of the prerequisites for intervention. It has shown only that it wishes to do that which the Court does not allow – impeach its own State in an original exclusive jurisdiction action.

II. EBID'S INTEREST IS NEITHER COMPELLING NOR UNIQUE

EBID has failed to show that it has a "compelling interest" in its own right, "apart from [its] interest in a class with all other citizens and creatures of the state." *See South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). EBID is a "creature" of the State of New Mexico.[1] The only interests that it represents are the

---

[1] EBID characterizes itself alternately as a quasi-municipal corporation, Motion 2, and a political subdivision of the State of

(Continued on following page)

interests of water users residing in its territory wholly within New Mexico. It is not a bistate entity, and it does not purport to represent interstate interests. The Compact assigns it no rights or responsibilities. Its participation as an intervenor is not necessary to the resolution of the States' dispute. It has presented no persuasive reason to conclude that it has a compelling interest distinct from the interests of the other citizens and creatures of New Mexico. EBID argues it should be allowed to intervene because it disagrees with New Mexico on matters of Compact interpretation, but this Court has rejected that as a basis for intervention.

A. EBID Is a Creature of the State of New Mexico

The Court has consistently held that an entity created under state law such as EBID, whose State is already a party to an original action, does not meet the high standard of a compelling interest for intervention although the number of water users it represents and the importance of their interests may be substantial. Thus, in *New Jersey v. New York*, the city of Philadelphia failed to meet its burden of showing a compelling interest in its own right, although it represented more than half of the Pennsylvania citizens residing in the Delaware River watershed area that depended on its waters. 345 U.S. at 373-74.

New Mexico, Elephant Butte Irrigation District, Legal Updates (2014), http://www.ebid-nm.org/legalUpdates/.

Philadelphia's contention that it represented worthwhile interests of its own was insufficient, the Court explained, because if the Court undertook to evaluate "all the separate interests within Pennsylvania," it "could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth." *Id.* at 373.

Similarly, the city of Charlotte failed to show a compelling interest for intervention in *South Carolina v. North Carolina*, although the complaint in that action, without seeking relief against Charlotte directly, named the city "as an entity authorized by North Carolina to carry out a large transfer of water from the Catawba River basin" – "the largest single transfer identified in the complaint," amounting to 33 million gallons of water per day. 558 U.S. at 262, 274. As "a municipality of North Carolina," Charlotte occupied "a class of affected North Carolina users of water," and the Court held that "the magnitude of Charlotte's authorized transfer d[id] not distinguish it in kind from other members of the class." *Id.* at 274. Nor did Charlotte represent "interstate interests" falling on both sides of the dispute between South Carolina and North Carolina. *Id.* Rather, the particular interest that it asserted fell "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *Id.* The Court explained that "a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State,

as *parens patriae*, represents on behalf of its citizens." *Id.*

EBID does not have a beneficial use water right; it distributes water from the river to its members in New Mexico, who individually hold the beneficial use water rights, and thus does not rise even to the same position as Philadelphia and Charlotte, both of which were substantial water right owners in their own right. Like Philadelphia and Charlotte, however, EBID is undisputedly a creature of one of the compacting States. By its own description, it is "an irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico." Motion 2. It was created pursuant to an enactment of the New Mexico Legislature. Mem. 20; N.M. Laws 1915, Chap. 100, as amended by N.M. Laws 1917, Chap. 21 (providing for cooperation between irrigation districts and the United States under the Reclamation Act). It "represents the interests of agricultural users in southern New Mexico who receive water supplies from the [Rio Grande] Project for irrigation of their lands, and is responsible for delivering the Project water supplies to these agricultural users." Mem. 20. It does not claim to represent any interests or perform any functions within Texas. *See id.* at 20-23.

Thus, EBID, like Philadelphia or Charlotte, represents the interests of its resident water users and is responsible for delivering water to those residents. EBID makes no claim to "represent interstate

interests that fall on both sides of this dispute." *South Carolina v. North Carolina*, 558 U.S. at 274. To the contrary, it represents "the surface water users *in New Mexico* who receive Project water deliveries for irrigation of their lands." Mem. 23 (emphasis added). Of necessity it concedes that New Mexico also represents those interests in its sovereign capacity as a party to this original action: "New Mexico . . . represent[s] the interests of water users in New Mexico, including both Project and non-Project users. . . ." *Id.* at 24. By seeking to intervene in this original action, EBID claims the very power that the Constitution reserves to New Mexico – the power to represent the citizens and water users of the State with respect to an interstate compact. *See* U.S. Const. art. I, § 10, cl. 3. Thus, the interests EBID seeks to represent in this Court fall "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *South Carolina v. North Carolina*, 558 U.S. at 274.

B. EBID Is Not a Bistate Entity or an Entity Whose Participation Is Necessary to Resolve This Action

EBID's failure to meet this Court's high standard to be granted intervention is demonstrated in the contrast between it and the unique positions of the two nonstate entities that were permitted to intervene in an equitable apportionment action for the first time, *viz.*, the Catawba River Water Supply Project (CRWSP) and Duke Energy Carolinas, LLC (Duke

Energy). *South Carolina v. North Carolina*, 558 U.S. at 269-73; *see id.* at 277 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Even though equitable apportionment actions are a significant part of our original docket, this Court has never before granted intervention in such a case to an entity other than a State, the United States, or an Indian tribe. Never.").

CRWSP had a compelling interest distinct from the interests of other citizens in *either* South Carolina or North Carolina because it was a joint venture of regulatory authorities in *both* States. *Id.* at 269. Unlike a political subdivision of one state dedicated to the interests of water users within that state, CRWSP served the water needs of approximately 100,000 individuals in each of the two States, transferring roughly half of its total withdrawals of water from the Catawba River to South Carolina consumers. *Id.* It had an advisory board with representatives from both States, operated infrastructure and assets owned by political subdivisions in both States, and drew its revenues from water sales in both States. *Id.* In short, it was "difficult to conceive of a more purely bistate entity." *Id.*

Duke Energy likewise had a compelling interest that could not be pigeon-holed as specific to one state or the other. It operated 11 dams and reservoirs in both States, through which it generated electricity for the entire region and controlled the flow of the river through the States. *Id.* at 272. There was no other similarly situated entity on the Catawba River. *Id.*

Moreover, it had a unique and compelling interest in protecting the terms of its federal regulatory license, which governed the river's minimum flow into South Carolina, as well as the terms of a comprehensive relicensing agreement representing the consensus of 70 parties from both States regarding the appropriate minimum continuous flow of the river. *Id.* at 261-62, 272-73. Duke Energy thus had a direct interest in the subject matter of the equitable apportionment action, an interest that was distinct from those of the class of citizens in either of the States. *Id.* at 273.

EBID does not argue that it is comparable to CRWSP. It does not argue that its asserted interests are "bistate" in nature, or independent of the interests of New Mexico water users. Nor could EBID make such a showing. It has conceded that, unlike a "purely bistate entity" such as CRWSP, *id.* at 269, it is a creature of the State of New Mexico, created pursuant to New Mexico law, and dedicated to the interests of the New Mexico water users within its territory. Motion 2; Mem. 20. It has no bistate oversight, operations, infrastructure, revenues, sales, customers, or constituents. It is a purely New Mexican entity representing purely New Mexican interests.

Nor has EBID demonstrated "powerful interests," comparable to those of Duke Energy, "that likely will shape the outcome of this litigation." *South Carolina v. North Carolina*, 558 U.S. at 271. Duke Energy had a unique interest in "the very subject matter in dispute," namely, the Catawba River's minimum flow

into South Carolina. *Id.* at 273. The importance of that interest was a function of the "'flexible'" nature of an equitable apportionment adjudication, in which "'all relevant factors'" are to be considered. *Id.* at 271 (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)). By contrast, the subject matter in dispute in the present case, as pleaded in Texas' complaint, involves the meaning and application of the Rio Grande Compact. Complaint ¶¶ 4, 10-28; *see Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("'[A] Compact is, after all, a contract.' It remains a legal document that must be construed and applied in accordance with its terms.") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)). EBID has offered no persuasive reason to conclude it has a unique or compelling interest in the meaning or application of the Compact that is apart from the interests of the States who are the parties to the Compact and to this original action. It is the States' intent, not EBID's, that matters and the States, along with the United States in this case, are the only proper parties to this original action.

EBID claims that as the entity "responsible for providing Project water to users in New Mexico," it has "the primary responsibility for effectuating the Compact purposes as applied to New Mexico." Mem. 21-22. EBID is mistaken. New Mexico, as a signatory of the Compact, has the responsibility for effectuating the Compact purposes for New Mexico. Complaint, App. 1, 20; *see Kansas v. Colorado*, 533 U.S. 1, 8 (2001). EBID no doubt carries out "significant responsibilities in operating, maintaining and managing the

Rio Grande Project in New Mexico."[2] Mem. 21. Fundamentally, EBID carries out its responsibilities, as an instrumentality of the State of New Mexico. Motion 2. It cannot arrogate to itself the position of a sovereign party to the Compact when, in fact, it is only a subdivision of one such sovereign.

EBID has failed to articulate any relevant basis for allowing it to intervene. Accepting such arguments for the first time here would open the door to intervention by any number of similarly situated entities in New Mexico and Texas. *See New Jersey v. New York*, 345 U.S. at 373 (recognizing that if Philadelphia were granted intervention, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties"). If EBID is allowed to intervene, other political subdivisions, including the city of Las Cruces, the El Paso County Water Improvement District No. 1 (EPCWID), the Hudspeth County Conservation and Reclamation District No. 1, and the city of El Paso in Texas, all can be expected to seek intervention as well. All of those entities receive deliveries of Project water or include numerous Project beneficiaries within their borders.

---

[2] EBID also claims responsibilities "in effectuating the purposes of the Rio Grande Project." Mem. 21. But as explained in New Mexico's Motion to Dismiss, and in Section II.C, below, it is the United States that has ownership of the Project diversion, storage, and release rights and is ultimately responsible for delivery of water to both irrigation districts under Reclamation law.

"Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states." *Id.* Other similarly situated water users in the Lower Rio Grande basin, such as the New Mexico Pecan Growers, may assert interests distinct from EBID's. EBID has offered no rationale for allowing it to intervene while ignoring the requests of many other similarly situated entities, both public and private. *See South Carolina v. North Carolina*, 558 U.S. at 269-73; *see id.* at 287 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("To the extent intervention is allowed for some private entities with interests in the water, others who also have an interest will feel compelled to intervene as well – and we will be hard put to refuse them.").

In sum, the States as sovereign parties to an original action presumptively represent all of their "citizens and creatures." *South Carolina v. North Carolina*, 558 U.S. at 266-67. EBID has not carried its burden of overcoming that presumption by showing that it has an interest "apart" and different in kind from those of all other citizens and creatures of New Mexico. *Id.* at 266.

C. The Compact Assigns No Rights or Obligations to EBID

Contrary to EBID's claims,[3] Mem. 9, the Compact's plain and unambiguous language apportions water among Colorado, New Mexico and Texas.

> The State of Colorado, the State of New Mexico and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman,

---

[3] EBID also incorrectly alleges a number of facts about the Project and New Mexico's position. Though not bearing directly on intervention, they bear directly on issues currently in litigation in other fora, and thus deserve note. For example, the right asserted by and adjudicated to the United States is a *surface* water right. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (Aug. 16, 2012). New Mexico did not contest that this right includes the right to redivert and reuse Project return flows that reach a drain or the river downstream from the first place of use. *Id.*, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference (Feb. 17, 2014). Nor has New Mexico, as EBID alleges, ever asserted a right to interfere with the Project return flows. *Compare* New Mexico's Motion to Dismiss at 18, 59 (Apr. 30, 2014) with Mem. 36-38. New Mexico disputes many other allegations of fact scattered throughout EBID's Motion and reserves the right to contest other allegations of fact should they become relevant in future proceedings herein.

> Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective governors,
> . . . .

Compact, ¶ 1.

The Compact apportionments are to the States and the delivery obligations explicitly assigned to the two upstream States, Colorado and New Mexico. *Id.*, Arts. III, IV ("The *obligation of Colorado* to deliver water in the Rio Grande at the Colorado-New Mexico state line. . . ."; "The *obligation of New Mexico* to deliver water in the Rio Grande at San Marcial. . . .") (emphasis added). Neither of the irrigation districts receiving Project water is mentioned in the Compact, and the Compact apportioned no water to either of those entities. New Mexico's stated delivery point is upstream of EBID. EBID has no role in New Mexico's Compact compliance. Nor does the irrigation districts' 1938 Reclamation contract "apportion" water to EBID, as EBID claims, Mem. 11, *see* App. 1a-4a, U.S. Brf. Amicus Curiae (Dec. 10, 2013), rather, it allocated water to the districts by authorized acreage under applicable Reclamation law. EBID's 1980 "Takeover Contract," Mem. 12, only transfers certain facilities in New Mexico to EBID, along with the obligation to operate and maintain those facilities at no cost to the United States. Finally, the Compact confers no rights or obligations on EBID to administer or ensure compliance with its terms. Rather, the Compact specifically

appoints a New Mexico official, the State Engineer, to the Compact Commission, which is responsible for administering the Compact. Compact, Art. XII.[4] It is New Mexico, as a signatory to the Compact, that is responsible for compliance with the Compact, not EBID. *See generally Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (compact apportionment "is binding upon the citizens of each State and all water claimants"); *accord West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (an interstate compact "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations").

Moreover, EBID claims to perform "significant responsibilities in operating, maintaining and managing the Rio Grande Project in New Mexico." Mem. 21. However, its discretion in performing those functions is limited. It is the United States that owns the right to divert and store water in the Project, and the individual farmers that have perfected the beneficial use rights for irrigation under Reclamation and New Mexico law. 43 U.S.C. §§ 372,[5] 383; *Ickes v. Fox*, 300

---

[4] "To administer the provisions of this compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The state engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico." Compact, Art. XII.

[5] § 372. Water right as appurtenant to land and extent of right. The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

(Continued on following page)

U.S. 82, 95 (1937). While the United States has transferred ownership of some appurtenant delivery structures, it has not and cannot transfer ownership of its reservoirs or its right to divert, store, release, and reuse Rio Grande Project water without additional Congressional action. *See* 43 U.S.C. § 498; *see also U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (holding federal agencies may not delegate authority to outside entities, public or private, absent express congressional consent).

EBID thus fails to assert any interest in the Compact that distinguishes it from the class of all affected Rio Grande water users in New Mexico. Like all other irrigation districts in New Mexico, it is a creature of the State. *Tompkins v. Carlsbad Irr. Dist.*, 630 P.2d 767, 769 (N.M. Ct. App. 1981). EBID is contractually obligated to maintain certain Project facilities in New Mexico and deliver the Project water it receives from the United States to its members in New Mexico, delivering an equal amount of water to all appurtenant properties.[6] Mem. 5, 12 & n.3. EBID does deliver water into canals which ultimately deliver water to other canals which serve EPCWID Project lands, and operates Project drainage facilities in New Mexico that collect return flows that might ultimately result in river flows to lands in EPCWID.

---

beneficial use shall be the basis, the measure, and the limit of the right.

[6] Contrary to EBID's implication, Mem. 12, the only source of water for the Project is surface water.

But it is a purely New Mexico entity that has no authority in Texas. EBID owns no beneficial use rights of its own, *id.* at 22-23. Like other irrigation districts, EBID conveys and distributes its members' water in accordance with state law and as adjudicated in state court.

III. EBID'S INTEREST IS REPRESENTED BY NEW MEXICO, ITS STATE OF INCORPORATION AND SOLE STATE OF OPERATION

EBID has also failed to show that its asserted interest in this original action "'is not properly represented'" by the State of which it is a part. *South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). To reiterate, the Court begins with the presumption that a State in its sovereign capacity represents the interests of all of its citizens and creatures. *Id.* at 267; *Nebraska v. Wyoming*, 515 U.S. at 21-22. North Carolina's response to the city of Charlotte's motion to intervene in *South Carolina v. North Carolina* readily applies here:

> [T]he State must represent the interests of every person that uses water from the North Carolina portion of the Catawba River basin. In fact, the State has a particular concern for its political subdivisions, such as Charlotte, which actually operate the infrastructure to provide water to the State's citizens. . . . The

> State has every reason to defend the [transfers] that it has authorized for the benefit of its citizens. The State cannot agree with any implication that because it represents all of the users of water in North Carolina it cannot, or will not represent the interests of Charlotte in this litigation initiated by South Carolina.

South Carolina v. North Carolina, 558 U.S. at 275 (quoting Brief for State of North Carolina in Response to City of Charlotte's Motion for Leave to Intervene and File Answer 1-2). Like North Carolina, New Mexico's interests are aligned with all of its water users and carriers, including EBID, in ensuring that it receives its full share of Compact water.

If anything, the State's interest in representing all of its citizens and political subdivisions is *stronger* in an action arising under an interstate compact than it is in an equitable apportionment action such as *South Carolina v. North Carolina*. In an equitable apportionment action, a State is deemed to represent its citizens by virtue of the *parens patriae* doctrine. *South Carolina v. North Carolina*, 558 U.S. at 266. The State's interest as *parens patriae* "has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition." *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Even when the State properly acts as *parens patriae*, moreover, the "flexible" nature of an equitable apportionment action allows the Court "to seek out the

most relevant information from the source best situated to provide it," which may include the individual interests of nonstate entities. *South Carolina v. North Carolina*, 558 U.S. at 272 (citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), where 17 private pipeline companies were granted intervention "in the interest of a full exposition of the issues").

In an original action under an interstate compact, by contrast, there is nothing "quasi" about the States' sovereign interests. *See Hinderlider*, 304 U.S. at 106 (citing *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837)). New Mexico's interest in this action derives not from an amorphous "judicial construct," *Alfred L. Snapp & Son*, 458 U.S. at 601, but directly from its status as a party to the Rio Grande Compact. Complaint, App. 1, 20. As a signatory State, New Mexico "unquestionably" has "a direct interest of its own" and properly takes "full control" of the litigation on behalf of its citizens where the Compact's meaning and application are at issue. *Kansas v. Colorado*, 533 U.S. at 8. And as in any ordinary contract action, the Compact's meaning is properly determined not by a broad search for input from whatever source, *South Carolina v. North Carolina*, 558 U.S. at 272, but by determination of the parties', that is, the States' intent and application of the Compact's terms in an adjudication between the compacting parties. *See Texas v. New Mexico*, 482 U.S. at 128.

EBID thus must overcome the presumption that New Mexico as the signatory to the Compact properly represents the interests of all of its citizens and

creatures. It must also overcome its own concession that, in fact, New Mexico represents the interests of the Project water users that EBID seeks to represent as well. Mem. 24 ("New Mexico . . . represent[s] the interests of water users in New Mexico, including both Project and non-Project users. . . ."). Its attempt to overcome that concession fails on its own terms. EBID argues that its interest diverges from New Mexico's interests because it has a "statutory mission" to ensure the integrity and feasibility of the Rio Grande Project. *Id.* But in so arguing, EBID has lost sight of who gave it its statutory mission. As EBID elsewhere concedes, it was "created under New Mexico law" pursuant to "an enactment of the New Mexico Legislature." *Id.* at 3, 20. In carrying out its statutory mission, it carries out an interest of the State of New Mexico. As such the "divergence of interests" on which EBID predicates its argument, *id.* at 24, simply does not exist.

EBID further maintains that its supposed divergent interests have led it and New Mexico to take "divergent positions." Mem. 24-26. To whatever extent EBID may take views different from the State's on particular issues, however, such differences do not show that New Mexico cannot properly represent EBID's interest in this action. Those differences of opinion only show that EBID's admitted goal in intervening is to impeach its home state – something this Court has said it cannot do. Disagreements between and among the citizens and creatures of a State are a fact of life in a pluralistic society. The

Court's concern that it not be "drawn into an intramural dispute over the distribution of water" presupposes that disputes within a State can and do exist. *New Jersey v. New York*, 345 U.S. at 373. Nevertheless, intramural disagreements in themselves will not justify a nonstate entity's intervention for the precise reason that, if they did, the State "'might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373); *see id.* at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State 'must be deemed to represent *all* its citizens,' not just those who subscribe to the State's position before this Court. The directive that a State cannot be 'judicially impeached on matters of policy by its own subjects' obviously applies to the case in which a subject disagrees with the position of the State.") (quoting *New Jersey v. New York*, 345 U.S. at 372, 373) (additional citation and internal quotation marks omitted). New Mexico properly represents the interests of its citizens and subdivisions in this Court whether or not they agree on all issues.

CONCLUSION

EBID's motion for leave to intervene should be denied.

Respectfully submitted,

HECTOR H. BALDERAS
Attorney General
STEPHEN R. FARRIS
SARAH A. BOND*
Assistant Attorneys General
AMY I. HAAS
Special Assistant Attorney General
General Counsel,
New Mexico Interstate Stream Commission
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-827-6010
sbond@nmag.gov
*Counsel of Record

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

JOHN B. DRAPER
Special Assistant Attorney General
DRAPER & DRAPER LLC
505-570-4590

JEFFREY J. WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87501
505-982-3873